85-602

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BANKERS AND SHIPPERS INSURANCE COMPANY OF NEW YORK,

Petitioner,

v.

CHARLES A. MARSHALL, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

---

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QUESTIONS PRESENTED

I. Does the filing of a certificate of insurance and B.M.C. 91 with the Interstate Commerce Commission terminate prior certificates of insurance under the I.C.C. Regulations which provide for termination of certificates of insurance by replacement filings.

II. If a replacement certificate of insurance with the required limits of liability of $500,000.00 is accepted by the Interstate Commerce Commission and there has been a judicial determination that the insurer has primary coverage for the motor carrier insured, is the insurer who filed a previous certificate of insurance bound by the temporary regulations of the I.C.C. which raised the minimum limits of the liability from $100,000.00 to $500,000.00 when the underlying insurance policy has a limit of liability of $100,000.00.

LIST OF PARTIES TO THE PROCEEDING

Bankers and Shippers Insurance Company of New York

Charles Marshall

Rebecca Marshall

Fireman's Fund Insurance Company

Gay & Taylor, Inc.

Paul Kudlak

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties to the Proceeding	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Jurisdictional Statement	1
Statutes Involved	2
Statement of the Facts and Case	4
Argument For the Allowance of the Writ	7
Conclusion	12
Appendix A	1a
Appendix B	2a
Appendix C	9a

TABLE OF AUTHORITIES

CASES: Page

Amalgamated Casualty Insurance Company v. *Winslow*, 135 F.2d 663 (Ct. App. D.C. 1943) 10, 11

Lewis Machine Company v. *Aztec Lines*, 172 F.2d 746 (7th Cir. 1949) 10, 11

STATUTES:

49 C.F.R. § 1043.2(c) 2

49 C.F.R. § 1043.7(d) 3, 7, 8, 9, 11

49 C.F.R. § 1043.7(e) 3, 7, 8, 9, 10, 11

MISCELLANEOUS:

21 F.R. 6303 (1956) 11

22 F.R. 2013 (1957) 11

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OPINIONS BELOW

There is an unpublished memorandum opinion of the Circuit Court of Marshall County, West Virginia dated August 20, 1984. Additionally, there is an unpublished Order of the Supreme Court of Appeals for the State of West Virginia.

JURISDICTIONAL STATEMENT

The Supreme Court of Appeals of West Virginia issued an Order denying a Petition for Appeal in this

matter on July 9, 1985. Jurisdiction is invoked under Title 28 of the United States Code Section 1257(3).

STATUTES INVOLVED

The pertinent regulations of the Industrial Commission are found in 49 C.F.R. § 1043.2 and read as follows:

(c) *Temporary rules: motor carriers of property.*

(1) In compliance with Sections 10927, Title 49 of the United States Code, the Interstate Commerce Commission has undertaken a rulemaking proceeding to provide for the filing of a motor carrier automobile bodily injury and property damage liability certificate of insurance. The proposed required filing certifies that the Interstate Commerce Commission's prescribed motor carrier automobile bodily injury and property damage liability endorsement form with a basic single limit liability amount (which may include public liability and environmental restoration coverage for freight vehicles of GVW ratings of 10,000 pounds or more) of $500,000 is attached to the insurance policy. The proposed rulemaking also would require additional letter filings for any excess amounts required under the rules established by the Secretary of Transportation.

(2) The Interstate Commerce Commission has revised the endorsement Form B.M.C. 90, to accommodate an increase in the minimum required bodily injury and property damage insurance limits of liability for motor carriers of property. Copies of the revised form have been mailed to all insurance companies which have been qualified to make filings with the Commission. That revised form adopted in the decision and final rules to be effective July 1, 1981, but now stayed is readopted and is unchanged.

(3) *To avoid the necessity for filing new certificates of insurance* for affected motor property carriers in lieu of those now on file with the Commission the following rule is in effect. During the pendency of the rulemaking proceeding, beginning on and after September 11, 1981, 12:01 a.m., (standard time at the address of the insured stated in each policy of insurance), the Commission will deem any certificates of insurance (B.M.C. 91) which are on file for motor carriers of property, to certify that the insurance policy provides protection for the public at the basic $500,000 single limit amount. This will be to the full extent, and subject to all of the terms, conditions, rights, and privileges, provided in revised Form B.M.C. 90, regardless of whether the prescribed endorsement has been attached physically to the policy. It will also be binding regardless of any contrary term, condition, stipulation, or agreement contained in the policy or any endorsement or notation thereof. This will allow carriers to maintain filings and yet allow adequate time for insurance companies to file with the Commission a notice of cancellation of the policy (B.M.C. 35), or to have a certificate terminated on the basis of a replacement certificate of insurance.

(4) Any certificate of insurance for an affected motor carrier of a property received by the Commission on or after August 1, 1981, will be accepted as certifying increased amounts of insurance at the proposed basic and temporary single limit level of $500,000.00.

Also pertinent to this review are rules contained in 49 C.F.R. § 1043.7 (d and e) which read as follows:

(d) *Cancellation notice.*

Except as provided in paragraph (e) of this section, surety bonds, certificates of insurance and

other securities or agreements shall not be cancelled or withdrawn until after thirty (30) days notice in writing by the insurance company, surety or sureties, motor carrier, broker or other party thereto, as the case may be, has first been given to the Commission at its office in Washington, D.C., which period of thirty (30) days shall commence to run from the date such notice is actually received at the office of the Commission.

(e) *Termination by replacement.*

Certificates of insurance or surety bonds which have been accepted by the Commission under these rules may be replaced by other certificates of insurance, surety bonds or other security, and the liability of the retiring insurer or surety bonds shall be considered as having been terminated as of the effective date of the replacement certificate of insurance, surety bond or other security, provided the said replacement certificate, bond or other security is acceptable to the Commission under the rules and regulations in this part.

STATEMENT OF THE FACTS AND CASE

Charles A. Marshall was injured on June 20, 1982 when a tractor trailer owned and operated by Drum Transportation, Inc., (hereinafter referred to as "Drum") ran over his vehicle on Interstate 70 near Washington, Pennsylvania.

Drum Transportation, Inc., is an I.C.C. certified motor carrier engaged in the interstate transportation of goods. In March of 1980, Bankers and Shippers Insurance Company of New York (hereinafter referred to as "Bankers and Shippers") issued a policy of liability insurance to Drum; the policy contained the minimum limits of liability as mandated by I.C.C.

regulations which was $100,000. When this policy was issued, Bankers and Shippers filed with the I.C.C. the required certificate of insurance and B.M.C. 91 endorsement certifying the necessary coverage and limits and indicating the effective date of March 1, 1980. An identical policy of insurance was issued in March of 1981 and Bankers and Shippers repeated the required filings with the I.C.C. (Appendix C, Exhibit 2)

On June 23, 1981, the I.C.C. adopted final rules modifying its insurance regulations. The July 1, 1981 effective date for these rules was stayed pending consideration of alternative rules. Temporary rules were adopted by the I.C.C. and remained in effect at all times relevant to this action. These temporary rules increased the minimum required limits of liability insurance coverage to $500,000.

The temporary regulations further provided that all B.M.C. 91 endorsements which were on file as of September 1, 1981 would be deemed to certify policy limits of $500,000 notwithstanding any policy provision to the contrary.

On August 4, 1982 Fireman's Fund Insurance Company (hereinafter referred to as "Fireman's Fund") filed a certificate of insurance and B.M.C. 91 endorsement under the revised I.C.C. regulations, certifying coverage to Drum at the required limits of $500,000. These filings indicated that the coverages in question were to be effective retroactively to February 21, 1982 and were apparently precipitated by the purchase of Drum by another Fireman's Fund insured. (App. C; Ex. 18)

On August 13, 1982 the Chief of the Insurance and Revocation Unit for the I.C.C. wrote to Bankers and

Shippers that the certificate of insurance for Drum which was effective March 1, 1981 would be cancelled effective February 21, 1982 by the filing received from Fireman's Fund. The letter further stated that no notice of cancellation should be filed. (App. C; Ex. 20)

Subsequent to these filings, attorneys for Charles Marshall contacted Bankers and Shippers and Fireman's Fund concerning a claim for personal injuries suffered by Marshall in the June 30, 1982 motor vehicle accident. A dispute arose regarding the available coverages and the present action was filed in 1983 on behalf of Charles Marshall and his wife, Rebecca Marshall. In a Motion for Declaratory Judgment Relief and/or Summary Judgment and/or Partial Summary Judgment the plaintiffs sought a declaration of the obligations and duties, if any, of the respective insurance companies under the appropriate I.C.C. rules, regulations and statutes.

The case was submitted to the trial Court upon the record, legal memoranda submitted by the parties and oral argument. On August 20, 1984 the trial Court issued its Memorandum of Opinion which held that under the appropriate I.C.C. regulations Fireman's Fund provided primary coverage to Drum on the date of the accident with limits of $500,000. The Court further held that Bankers and Shippers provided secondary or excess coverage to Drum with limits of $500,000 for the damage alleged by the Marshalls.

Bankers and Shippers filed a Petition for Appeal with the Supreme Court of Appeals of West Virginia. Assigned as error was the lower Court holding that Bankers and Shippers owed excess coverage to Drum with limits of $500,000, pursuant to I.C.C. regulations.

The assignment of error was summarized in the Petition for appeal as follows:

> The evidence submitted to the lower court was uncontroverted that Fireman's Fund filed with the Interstate Commerce Commission a certificate of insurance and B.M.C. 91 endorsement certifying coverage available to Drum effective February 21, 1982. Despite the fact that I.C.C. regulations clearly provide that a certificate of insurance is terminated upon filing of a replacement, the trial court refused to recognize that the Bankers and Shippers policy was revoked by the filing of the certificate by Fireman's Fund.

On July 9, 1985 the Supreme Court of Appeals of West Virginia denied Bankers and Shippers Petition.

ARGUMENT FOR THE ALLOWANCE OF THE WRIT

Regulations of the Interstate Commerce Commission provide two specific methods by which certificates of insurance may be terminated. An insurance carrier may give thirty (30) days written notice of cancellation to the I.C.C. 49 C.F.R. § 1043.7(d). Alternatively, certificates of insurance may be replaced by other certificates of insurance if the replacement certificate is acceptable to the Interstate Commerce Commission under its rules and regulations. 49 C.F.R. § 1043.7(e). Under the latter procedure for termination, the regulation provides that the retiring insurer's liability "*shall* be considered as having terminated as of the effective date of the replacement certificate of insurance," 49 C.F.R. § 1043.7(e) (emphasis added).

Initially, the lower Court ruled that Fireman's Fund had $500,000 coverage available to Drum for the accident of June 30, 1982 by virtue of the certificate of

insurance and B.M.C. 91 endorsement which had been filed by Fireman's Fund in August 1982 with an effective date of February 21, 1982. The Court then found that Bankers and Shippers had failed to effectively cancel their filings and as such provided excess coverage to Drum in the amount of $500,000 for the accident of June 30, 1982. In discussing the applicable regulation, the Court correctly stated the sole issue of law involving Bankers and Shippers was "whether the Bankers and Shippers' filing could have been cancelled by replacement of new insurance or whether some type of notice procedure should have been used."

Focusing on the provisions of paragraph (d) of the above cited regulation, the Court noted that the "relevant portion" provides:

> . . . certificates of insurance . . . shall not be cancelled or withdrawn until after 30 days notice in writing, by the insurance company . . . to the Commissioner at his office in Washington, D.C. . . . (App. B at p.6)

Although it was recognized that paragraph (e) of § 1043.7 provides that certificates of insurance may be terminated by replacement filing, the Court ruled that the notice requirements of paragraph (d) must *also* be met before a replacement filing will terminate a certificate.

A review of the applicable regulation immediately reveals that the Court's ruling was in error. In quoting from paragraph (d) in its Memorandum of Opinion, the Court omitted by elipsis the crucial initial clause in the paragraph. This initial clause, which reads, "Except as provided in paragraph (e) of this section," clearly establishes that the requirements of paragraph

(d) are alternative to, and not in addition to, the provisions of paragraph (e).

Considering the full text of § 1043.7(d), and particularly the portion which was omitted from the lower Court's opinion, it is simply beyond reasonable argument that paragraph (d) is excluded, *by its own terms,* from applying to paragraph (e).

Considering the facts established in the record below in light of the unmistakable provisions of § 1043.7(e), it is clear that the Bankers and Shippers policy affords no coverage to Drum by virtue of the I.C.C. regulations. In August of 1982, Fireman's Fund filed with the I.C.C. its certificate of insurance together with the required B.M.C. 91 endorsement, providing coverage to Drum effective February 21, 1982. (App. C, Ex. 18) According to the mandate of § 1043.7(e), the Bankers and Shippers policy was therefore terminated as of February 21, 1982. Given that fact, there could be no coverage available to Drum from Bankers and Shippers for an accident which occurred in June, 1982.

It is important to note here that aside from the effect of the I.C.C. regulations, Bankers and Shippers recognizes it has a separate contractual obligation to provide coverage to Drum in this instance. Bankers and Shippers issued a liability policy to Drum with limits of $100,000.00, which policy it will stand by regardless of the outcome of this appeal. It is the determination that the Bankers and Shippers policy provides coverage *because of the I.C.C. regulations* that is challenged here. This determination regarding the reason for coverage is crucial, as the I.C.C. regulations may operate to increase the available coverage under the Bankers and Shippers policy to $500,000.00.

Although it is apparent that the provisions of 49 C.F.R. § 1043.7(e) mandate a reversal of the lower Court's decision regarding Bankers and Shippers, petitioner is constrained to briefly discuss and distinguish the cases cited by the Court in support of its ruling. Initially, the Court discussed the opinion in *Lewis Machine Co.* v. *Aztec Lines,* 172 F.2d 746 (7th Cir. 1949). In that case, St. Paul Fire & Marine Ins. Co. had issued a liability policy to Aztec Lines, Inc., an interstate motor carrier. An effort was made to cancel the policy, effective May 1, 1947, pursuant to the policy terms. The carrier procured new coverage, effective May 1. An accident occurred on May 13, and the Court held that the St. Paul policy applied, despite the new coverage, because St. Paul had not provided notice of termination to the I.C.C.

The other opinion cited by the lower Court is *Amalgamated Casualty Ins. Co.* v. *Winslow,* 135 F.2d 663 (Ct. App. D.C. 1943). In that case, Amalgated issued a liability policy to Elliott in June of 1940. On October 6, 1940, Elliott secured new coverage from Pennsylvania Casualty. No notice of cancellation was given by Amalgamated prior to an accident involving Elliott on October 30, 1940. The Court held that Amalgamated's coverage applied regardless of the new insurance.

In searching the administrative history of § 1043.7, it is immediately evident that neither of the cases cited by the lower Court has any application to the case at bar. This stems from the fact that the I.C.C. regulation authorizing termination of certificates of insurance by replacement (§ 1043.7(e)) did not take effect until June 30, 1957. The legislative history of paragraph (e) reveals that in August of 1956, the Interstate Commerce Commission served notice that a revision was

to be made to certain regulations, which notice appeared at 21 F.R. 6303 (1956). No oral hearing on the proposed revisions was deemed necessary, and at its meeting on February 28, 1957, the Commission issued the Order which added the "termination by replacement" paragraph, then identified as 49 C.F.R. Part 174(e). This provision was made effective on June 30, 1957. See 22 F.R. 2013 (1957). The cases cited by the lower Court were decided in 1943 (*Amalgamated*) and 1949 (*Lewis Machine*). The regulation relied upon by Bankers and Shippers in this case was not even in existence at the time those cases were decided. Clearly, § 1043.7(e) would today mandate a contrary result in the *Amalgamated* and *Lewis Machine* cases.

Based upon the foregoing review of the I.C.C. regulations, there can be no doubt that the certificate of insurance issued to Drum by Bankers and Shippers was terminated, pursuant to § 1043.7(e), when the Fireman's Fund coverage became effective on February 21, 1982. Clearly, the I.C.C. interpreted its own regulations in the manner suggested by petitioner herein. After receipt of the filings on behalf of Fireman's Fund, the I.C.C. notified Bankers and Shippers that their certificate of insurance for Drum had been cancelled effective February 21, 1982. (App. C; Ex. 20) Additionally, the I.C.C. recognized that the notice provisions of 49 C.F.R. § 1043.7(d) were an alternative method of termination and not an added requirement to termination under the provisions of 49 C.F.R. § 1043.7(3) since the notice to Bankers and Shippers from the I.C.C. stated that no notice of cancellation should be filed. (App. C; Ex. 20)

Given that fact, it necessarily follows that the Bankers and Shippers policy afforded no coverage to Drum

by virtue of the I.C.C. regulations for the June, 1982 accident. The decision of the Circuit Court in that respect was therefore clearly a misinterpretation and misapplication of Federal law.

CONCLUSION

For the reasons stated hereinabove, the petitioner respectfully requests this Honorable Court to grant a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 9th day of July, 1985, the following order was made and entered, to-wit:

CHARLES A. MARSHALL, ET AL.

vs.

BANKERS & SHIPPERS INSURANCE COMPANY OF NEW YORK

On a former day, to-wit, June 28, 1985, came the petitioner, Bankers & Shippers Insurance Company of New York, a corporation, by Bachmann, Hess, Bachmann & Garden, John B. Garden, Paul T. Tucker and John E. Artimez, Jr., its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Marshall County rendered on the 20th day of August, 1984, which being seen and inspected by the Court the appeal prayed for is refused.

A True Copy

Attest: /s/ [Illegible]
Clerk Supreme Court of Appeals

APPENDIX B

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

Civil Action No. 83-C-308W

CHARLES A. MARSHALL, and REBECCA MARSHALL, his wife, *Plaintiffs,*

vs.

BANKERS AND SHIPPERS INSURANCE COMPANY OF NEW YORK, a corporation, FIREMAN'S FUND INSURANCE COMPANY, a corporation, TRUCK INSURANCE EXCHANGE, a corporation, AMERICAN INSURANCE COMPANY, a foreign corporation, GAY AND TAYLOR INC., a corporation, and PAUL P. KUDLAK, an individual, *Defendants.*

MEMORANDUM OF OPINION

The plaintiff in this declaratory judgment action was injured when a tractor trailer owned and operated by Drum Transportation (hereinafter referred to as Drum), ran over his vehicle on Interstate 70, near Washington, Pa., on June 30, 1982. At the time of the accident, and two years prior, Drum had been insured by defendant Bankers and Shippers Insurance Company of New York (hereinafter referred to as Bankers and Shippers). The bodily injury limits on this policy were $100,000.00 per occurrence. On July 28, 1982, Emar Corporation requested that defendant Fireman's Fund add Drum to the insurance policy of Seigel Transfer, Inc. Apparently Seigel had acquired some or all of Drum's assets. On August 4, 1982, Fire-

man's Fund made an I.C.C. filing on behalf of Drum under the Seigel policy. This filing was made retroactive to February 21, 1982. A motion for summary judgment by the plaintiffs is now before this Court.

ISSUE

Which of the named defendants were assigned to the risk at the time of the accident on June 30, 1982, and what, if any, is the extent of their liability to the plaintiffs?

ARGUMENT

"It is a matter of common knowledge that the transportation of freight upon the highways, usually by means of huge trucks and trailers, is fraught with great danger to the traveling public." *Hodges vs. Johnson,* 52 F.Supp. 488, 490 (W.D. Va. 1943) To deal with this problem, comprehensive regulatory laws have been enacted to control this type of transportation. These laws require vehicles engaged in freight shipments on the highways to be covered by liability insurance. The primary purpose of these laws is "that the public at large be at all times protected in its possible claims against the owner or driver of a motor vehicle coming within the purview of the statute by valid liability insurance". (171 A.L.R. 550) Keeping in mind, this over-riding principle, we will not examine separately the liability of each of the defendants.

Defendant Fireman's Fund was made a party to this action by virtue of their I.C.C. filing on August 4, 1982. Previous to this date, Fireman's Fund had endorsed Drum to a policy issued to Seigel Transfer Company. The I.C.C. filing was retroactive to Febru-

ary 21, 1982, thus establishing Fireman's Fund's liability as an insurer at the date of the accident.

Fireman's Fund denies liability for this claim based on two defenses: (1) that the I.C.C. filing of August 4, 1982, was the result of a clerical error, and (2) because they were not assigned to the claim that at the time the accident took place, they had no insurable interest. The Court will separate these issues for discussion.

The alleged "clerical error" was made when Drum was added to the Seigel policy on July 28, 1982. (See plaintiff's exhibit 8-H) Fireman's Fund then filed a B.M.C. 91 with the I.C.C. on August 4, 1982, retroactive to February 21, 1982. Fireman's Fund had thirty days in which to disclaim the filing, after which the certificate became effective. To allow Fireman's Fund to disclaim the certificate, after the thirty days, would be a direct repudiation of the purpose of compulsory insurance. Therefore, the Fireman's Fund filing with the I.C.C. must stand regardless of whether the filing was the result of a clerical error.

The second issue raised by Fireman's Fund is whether they lacked an insurable interest in Drum Transportation at the time of the accident. All insurance contracts, including liability insurance, must be supported by an insurable interest. *Blashfield's Cyclopedia of Automobile Law and Practice* states that:

> ". . . the right of the insured to recover does not depend upon his being the holder, in fact, of either a legal or equitable title of interest in the property, but whether he is primarily charged at law or in equity with an obligation for which he is liable."

Following this logic, the possibility of a legal liability occurring from the operation of an automobile should be considered an insurable interest. (1 A.L.R.3d 1193, 1195) Although not all courts have agreed, a great number have held to this principle. (*Rea vs. Hardware Mutual Casualty Co.*, 15 N.C.App. 620, 190 S.E.2d 708, *Davis vs. St. Paul-Mercury Indemnity Co.*, 294 F.2d 641, *American Mutual Fire Ins. Co. vs. Passmore*, 274 S.E.2d 416, *Maryland Casualty Co. vs. Baker*, 196 F.Supp. 234)

In applying this rule to the case at hand, this Court holds that Fireman's Fund did have an insurable interest in its insured, Drum Transportation, at the time of the accident. We have already established that due to the I.C.C. filing effective February 21, 1982, Fireman's Fund was assigned to the claim at the time of the accident. Therefore, Fireman's Fund is legally liable for payment on any and all claims covered by its liability policy on Drum up to the statutory limit of $500,000.00.

Defendant Bankers and Shippers issued a policy to Drum effective March 1, 1982, with policy limits of 100/300/50. In addition, Bankers and Shippers also made I.C.C. filing on behalf of Drum for 1980-81 and 1981-82. The 1980-81 certificate was cancelled by the filing of a B.M.C. 35. The 1981-82 certificate was never cancelled by Bankers and Shippers. Instead, the old Bankers and Shippers certificate was replaced by the new Fireman's Fund policy on August 4, 1982.

Bankers and Shippers now claim that they were cancelled by the retroactive Fireman's Fund filing and were not on the claim at the time of the accident. Thus, the issue is whether the Bankers and Shippers filing

could have been cancelled by replacement of new insurance or whether some type of notice procedure should have been used.

The procedure used to cancel a certificate of insurance is detailed in 49 C.F.R. Section 1043.7, Subparagraphs (d) and (e). Paragraph (d) deals with cancellation notice. The relevant portion provides that:

> ". . . certificates of insurance . . . shall not be cancelled or withdrawn until after 30 days notice in writing, by the insurance company . . . to the Commissioner at his office in Washington, D.C. . . ."

Paragraph (e) deals with termination of the certificate by replacement. This section provides:

> "Certificates of insurance or surety bonds which have been accepted by the Commission under these rules may be replaced by other certificates of insurance, surety bonds or other security, and the liability of the retiring insurer or surety under such certificates of insurance or surety bonds shall be considered as having terminated as of the effective date of the replacement certificate of insurance, surety bond or other security, provided the said replacement certificate, bond or other security is acceptable to the Commission under the rules and regulations in this part."

The question of whether replacement of the old certificate with new insurance is sufficient notice of cancellation was discussed in the case of *Lewis Machine Company vs. Aztec Lines Inc,* 172 F.2d 746. In this case, a policy filed with the I.C.C. was replaced with new insurance. The court ruled that the old I.C.C.

filing remained in effect until cancelled, pursuant to the statutory rules, depite the new insurance. Another similar case, *Amalgamated Casualty Ins. Co. vs. Winslow,* 77 App. D.C. 382, 135 F.2d 663, produced a similar result. *Amalgamated* involved a bond filed with the Public Utility Commission by a taxicab owner. By statute, the bond could not be cancelled without 20 days notice to the Commission. The insured obtained a new policy, but did not cancel the old bond. The court held that the new insurance did not cancel the express notice provision of the statute. The court further reasoned as follows:

> "If such an exception were recognized in cases like this one, the public would be deprived of a part of the protection which the statute seeks to give; for an injured person could not then safely sue any insurer of record, but would have to inquire into the state of the accounts between insurer and insured."

Looking at the facts in this case, it is clear that an injured party would have assumed that Bankers and Shippers was the insurer of record up until August 4, 1982, when Fireman's Fund made their I.C.C. filing. Indeed, even the I.C.C. considered Bankers and Shippers to be the insurer of record as of July, 1982. (See Plaintiff's exhibit number 20)

Because the public has a right to rely on the filings made with the I.C.C., this Court finds that Bankers and Shippers had not filed to effectively cancel their filing and were therefore, on the claim on the date of the accident. The substitution of another insurance policy is not sufficient notice to the public of cancellation.

A second corrollary issue is the amount of coverage due to the plaintiff by Bankers and Shippers. As previously expressed, the policy limits on the Drum insurance policy were 100/300/50 or $100,000.00 per bodily injury occurrence. However, at the same time, a valid I.C.C. filing was also in effect. On June 23, 1981, the I.C.C. adopted temporary rules aimed at raising the minimum amounts of bodily injury coverage to $500,000.00. (49 C.F.R. 1043.2(c)) These temporary rules specified that unless a B.M.C. 35 cancellation notice was filed by the insurer, the I.C.C. would assume that $500,000.00 coverage was in place. This statute went into effect September 1, 1981. Thus, the Court finds that Bankers and Shippers can be held liable up to the statutorily prescribed amount of $500,000.00.

Because this Court finds that there is no evidence to show that defendant American Insurance was on the claim on June 30, 1982, the Court dismisses the motion against said defendant.

For the aforementioned reasons, it is the opinion of this Court that liability amoung the defendants should be assigned as follows: Defendant Fireman's Fund shall be liable to the plaintiff up to the statutory limit of $500,000.00; Defendant Bankers and Shippers shall be liable for any damages over and above the amount of $500,000.00, with the amount not to exceed $500,000.00. The Court further finds that the claim against Defendant American Insurance shall be dismissed.

Dated this 20 day of August, 1984.

/s/ Richard A. Waimute
Judge

APPENDIX C

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

Civil Action No. 83-C-308 W

CHARLES A. MARSHALL, ET AL.,
Plaintiffs,

VS.

BANKERS & SHIPPERS INSURANCE COMPANY OF NEW YORK, ETC., ET AL., *Defendants.*

MOTION FOR DECLARATORY JUDGMENT RELIEF AND/OR SUMMARY JUDGMENT AND/OR PARTIAL SUMMARY JUDGMENT

Plaintiffs, Charles A. Marshall and Rebecca Marshall, respectfully move this Honorable Court as follows:

1. To grant Declaratory Judgment Relief and/or Summary Judgment and/or Partial Summary Judgment upon the following matters, questions or issues in this civil action, to-wit:

(a) That a justiciable controversy exists that is susceptible to declaratory judgment relief;

(b) That on June 30, 1982, one or more of the defendants were "on the risk," within the meaning of the requirements of the Interstate Commerce Commission and the appropriate federal regulations and statutes;

(c) That on June 30, 1982, the plaintiffs were "members of the public" within the meaning of the protective provisions of the requirements of the Interstate

Commerce Commission and the appropriate federal regulations and statutes;

(d) That on June 30, 1982, there was a minimum of $500,000.00 in insurance coverage available from one or more of the defendants to cover plaintiffs' claim or loss, as required by the Interstate Commerce Commission and the appropriate federal regulations and statutes;

(e) That one or more of the defendants made "filings" which cover plaintiffs' claim or loss of June 30, 1982, as required by the Interstate Commerce Commission and the appropriate federal regulations and statutes;

(f) That one or more of the defendants owe a duty of primary coverage for plaintiffs' claim or loss of June 30, 1982, as required by the Interstate Commerce Commission and the appropriate federal regulations and statutes;

(g) That one or more of the defendants may owe a duty of "excess" or secondary coverage for plaintiffs' claim or loss of June 30, 1982;

(h) That one or more of the defendants' coverages may be "contributory" for plaintiffs' claim or loss of June 30, 1982;

(i) That one or more of the defendants owe a duty to defend the defendants, George E. Musser, Drum Service, Inc., aka Drum Transportation, Inc., a corporation, Siegel Transfer, Inc., a corporation, Churchill Transfer, Inc., a corporation, in that certain civil action styled: "Charles A. Marshall and Rebecca Marshall, his wife, plaintiffs, vs. George E. Musser, Drum Service, Inc., a/k/a Drum Transportation, Inc., a cor-

poration, Siegel Transfer, Inc., a corporation, Churchill Transfer, Inc., a corporation, defendants," Docket No. 84-1272, now pending in the United States District Court for the Western District of Pennsylvania;

(j) That a determination be made as to which one (or more) of the defendants was "on the risk," owed a duty of "primary" coverage and/or "secondary or excess" coverage, a duty to defend, made "filings," etc., as explicated in the foregoing sub-paragraphs;

(k) That the plaintiffs be afforded such further relief, including attorney fees, as may be appropriate upon the facts, circumstances and current record.

In support whereof, plaintiffs annex hereto the following exhibits which are designated Exhibits "D/J 1" through "D/J 35."

Signed: /s/ G. C. Hughes
G. Charles Hughes, L.C.
Of Counsel for Plaintiffs
Address: Seventh at Court Avenue
Moundsville, WV 26041

"D/J 2"

MOTOR CARRIER AUTOMOBILE BODILY INJURY LIABILITY AND PROPERTY DAMAGE LIABILITY CERTIFICATE OF INSURANCE

filed with

INTERSTATE COMMERCE COMMISSION

Bureau of Operations

Washington, D.C. 20423

(Executed in Triplicate)

To be sent to—

INTERSTATE COMMERCE COMMISSION

Bureau of Operations

Washington, D.C. 20423

146137

Interstate Commerce Commission Docket No.

MC 135381

Received:

Date _____

This is to certify, That the Bankers and Shippers Insurance Company of New York (hereinafter called Company) of New York, New York has issued to Drum Transportation Company of R.D. #1, Montgomery, Pa. 17752 a policy or policies of Automobile Bodily Injury Liability, and Property Damage Liability Insurance which, by the attachment of endorsement, form number B.M.C. 90, approved by the Interstate Commerce Commission, has or have been amended to provide the coverage or security for the protection of the public required with respect to the operation, maintenance, or use of motor vehicles under certificate of public convenience and necessity or permit issued to the Insured by the Interstate Commerce Commission or otherwise in transportation subject to Part II of the Interstate Commerce Act and the pertinent rules and regulations of the Interstate Commerce Commission, regardless of whether such motor vehicles are specifically described in the policy or policies or not. The liability of the Company extends to

all losses, damages, injuries, or deaths whether occurring on the route or in the territory authorized to be served by the Insured or elsewhere.

Whenever requested by the Commission, the Company agrees to furnish to the Commission a duplicate original of said policy or policies and all endorsements thereon.

The endorsement described herein may not be cancelled without cancellation of the policy (or policies) to which it is attached. Such cancellation may be effected by the Company or the Insured giving thirty (30) days' notice in writing to the Interstate Commerce Commission at its office in Washington, D. C., said thirty (30) days' notice to commence to run from the date notice is actually received at the office of said Commission.

Effective from 3/1/81 (12:01 a.m., standard time at the address of the Insured as stated in said policy or policies) and continuing until cancelled as provided in the rules and regulations under section 215.

Countersigned at 3060 S Church St. Burlington N.C. 2/24/81

Bankers and Shippers Ins. Co. of N.Y.
P.O. Box 2510, Burlington, N.C. 27215
/s/ William K. O'Brien

Insurance Company File No. AC 152403 A/R

MOTOR CARRIER AUTOMOBILE BODILY INJURY LIABILITY AND PROPERTY DAMAGE LIABILITY CERTIFICATE OF INSURANCE

filed with

INTERSTATE COMMERCE COMMISSION

Bureau of Operations

Washington, D.C. 20423

(Executed in Triplicate)

To be sent to—

INTERSTATE COMMERCE COMMISSION

Bureau of Operations

Washington, D.C. 20423

50130L

Interstate Commerce Commission Docket No.

MC 135381

Received:

Date _____

This is to certify, That the Bankers and Shippers Insurance Company of New York (hereinafter called Company) of New York, New York has issued to Drum Transportation Co. of R.D. #1, Montgomery, Pennsylvania 17752 a policy or policies of Automobile Bodily Injury Liability, and Property Damage Liability Insurance which, by the attachment of endorsement, form number B.M.C. 90, approved by the Interstate Commerce Commission, has or have been amended to provide the coverage or security for the protection of the public required with respect to the operation, maintenance, or use of motor vehicles under certificate of public convenience and necessity or permit issued to the Insured by the Interstate Commerce Commission or otherwise in transportation subject to Part II of the Interstate Commerce Act and the pertinent rules and regulations of the Interstate Commerce Commission, regardless of whether such motor vehicles are specifically described in the policy or policies or not. The liability of the Company extends to all losses, damages, injuries, or deaths whether occurring

on the route or in the territory authorized to be served by the Insured or elsewhere.

Whenever requested by the Commission, the Company agrees to furnish to the Commission a duplicate original of said policy or policies and all endorsements thereon.

The endorsement described herein may not be cancelled without cancellation of the policy (or policies) to which it is attached. Such cancellation may be effected by the Company or the Insured giving thirty (30) days' notice in writing to the Interstate Commerce Commission at its office in Washington, D. C., said thirty (30) days' notice to commence to run from the date notice is actually received at the office of said Commission.

Effective from 3/1/80 (12:01 a.m., standard time at the address of the Insured as stated in said policy or policies) and continuing until cancelled as provided in the rules and regulations under section 215.

Countersigned at 262 E. Morehead St Burlington N.C. 27215 2/22/80

Bankers and Shippers Insurance Co. of N.Y.
P.O. Box 2510, Burlington, N.C. 27215
/s/ Illegible

Insurance Company File No. AC 143686 A/R

"D/J 18"

MOTOR CARRIER AUTOMOBILE BODILY INJURY LIABILITY AND PROPERTY DAMAGE LIABILITY CERTIFICATE OF INSURANCE

filed with

INTERSTATE COMMERCE COMMISSION

Bureau of Operations

Washington, D.C. 20423

(Executed in Triplicate)

To be sent to—

INTERSTATE COMMERCE COMMISSION

Bureau of Operations

Washington, D.C. 20423

39230

Interstate Commerce Commission Docket No.

MC 135381

Received:

Date _____

This is to certify, That the Fireman's Fund Ins. Co. (hereinafter called Company) of 3333 California St. San Francisco, Calif. has issued to Drum Transportation Co. of 8216 Bletzer Rd. Baltimore, Md. 21222 a policy or policies of Automobile Bodily Injury Liability and Property Damage Liability Insurance which, by the attachment of endorsement, form number B.M.C. 90, approved by the Interstate Commerce Commission, has or have been amended to provide the coverage or security for the protection of the public required with respect to the operation, maintenance, or use of motor vehicles under certificate of public convenience and necessity or permit issued to the Insured by the Interstate Commerce Commission or otherwise in transportation subject to Part II of the Interstate Commerce Act and the pertinent rules and regulations of the Interstate Commerce Commission, regardless of whether such motor vehicles are specifically described in the policy or policies or not. The liaibility of the Company extends to

all losses, damages, injuries, or deaths whether occurring on the route or in the territory authorized to be served by the Insured or elsewhere.

Whenever requested by the Commission, the Company agrees to furnish to the Commission a duplicate original of said policy or policies and all endorsements thereon.

The endorsement described herein may not be cancelled without cancellation of the policy (or policies) to which it is attached. Such cancellation may be effected by the Company or the Insured giving thirty (30) days' notice in writing to the Interstate Commerce Commission at its office in Washington, D. C., said thirty (30) days' notice to commence to run from the date notice is actually received at the office of said Commission.

Effective from 2/21/82 (12:01 a.m., standard time at the address of the Insured as stated in said policy or policies) and continuing until cancelled as provided in the rules and regulations under section 215.

Countersigned at Box 230 Parsippany, N. J. 07054 8/4/82

North Jersey Branch
/s/ Illegible

Insurance Company File No. 7-91 KLA 3213423

"D/J 20"

INTERSTATE COMMERCE COMMISSION
WASHINGTON, D.C. 20423

In reply refer to:
K811R - 392342
DATE 08/13/82
DOCKET # MC 135381

L. G. Prairie, Vice President
Operations Department
Bankers & Shippers Ins. Co. of New York
262 East Morehead St.
Burlington, NC 27215

Re: DRUM TRANSPORTATION COMPANY
MONTGOMERY, PA
BI&PD certificate of insurance
Policy No.: 457774
Effective: 03/01/81

Dear Sir:

Your ICC certificate of insurance described in the above caption will be cancelled effective 02/21/82 by a filing recently received from Fireman's Fund Insurance Co.

This replacement becomes a part of our records unless either you or the insured promptly advise us otherwise. No notice of cancellation should be filed.

Very truly yours,

Janet R. Goktepe, Chief
Insurance and Revocation Unit

cc: DRUM TRANSPORTATION COMPANY
R.D. NO. 1
MONTGOMERY, PA 17752

If you have any questions please call 212-563-1710.

BEST AVAILABLE COPY

(2)

Supreme Court, U.S.
FILED
DEC 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-602

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

BANKERS AND SHIPPERS INSURANCE OF NEW YORK,

Petitioner,

v.

CHARLES A. MARSHALL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

*JOHN E. HALL
*LOUIS C. LONG
SCOTT T. REDMAN

MEYER, DARRAGH, BUCKLER, BEBENEK & ECK
2000 The Frick Building
Pittsburgh, Pennsylvania 15219
(412) 261-6600

Attorneys for Respondent Fireman's Fund Insurance Company

**Counsel of Record*

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Statement of the Case	1
Summary of Argument	2
Argument Against the Allowance of the Writ	2
Conclusion	3

TABLE OF AUTHORITIES

Cases: Page

49 C.F.R. § 1043.7(e) 2

STATEMENT OF THE CASE

The petitioner generally sets forth the facts of this case. However, several pertinent facts were omitted by petitioners. The following facts were omitted from the petitioner's statement of the case.

On June 30, 1982, the date of the underlying automobile accident, neither respondent Fireman's Fund Insurance Company ("Fireman's Fund") nor its insured, Siegel Transfer, Inc. ("Siegel") had any connection with Drum Transportation, Inc. ("Drum"). On that date, however, petitioner insured Drum pursuant to a certificate of insurance issued in accordance with federal regulations. (Ex. D/J 2, R. 12a-13a).

In late July, 1982, Siegel negotiated a purchase of Drum's Interstate Commerce Commission ("ICC") hauling rights and permits. (R. 2a). Before the August, 1982 consummation of this sale, and perforce, at the time of the motor vehicle accident in question, Siegel had no interest whatsoever in the operation of Drum. (R. 2a).

On July 28, 1982, Siegel's liability insurer, Fireman's Fund, attempted to issue an endorsement to Siegel's policy naming Drum as an additional insured. (R. 2a). On August 4, 1982, over a month after the underlying motor vehicle accident, Fireman's Fund issued a certificate of insurance for Drum in the form required by the ICC. (Ex. D/J 18, R. 16a-17a). Due to a clerical error in the ICC filing (R. 4a), the effective date of the coverage for Drum was listed as February 21, 1982. (R. 17a). In February, 1983, the mistaken ICC filing was discovered and corrected by Fireman's Fund.

Despite the clercial error of Fireman's Fund and the lack of an insurable interest of Siegel, the Circuit Court of Marshall County, West Virginia, held that Fireman's Fund provided primary insurance coverage for Drum. (R. 4a-5a). The court also concluded that petitioner's ICC certificate (Ex. D/J 2, R. 14a-15a) afforded Drum excess insurance coverage. (R. 5a-7a). Each insurer

sought review in the Supreme Court of Appeals of West Virginia. Although petitioner's Petition for Appeal was denied (R. 1a). The Petition of Fireman's Fund was granted by the West Virginia high court on November 20, 1985.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied because this coverage dispute could be rendered moot by the action of the West Virginia Supreme Court of Appeals. If Fireman's Fund's appeal succeeds before that tribunal, there would be no replacement coverage within the ambit of 49 C.F.R. § 1043.7(e) and, accordingly, petitioner's coverage would be deemed to continue.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF THE WRIT

The petition for a writ of certiorari should be denied because action by the West Virginia Supreme Court of Appeals could render petitioner's claims moot. The pending appeal of Fireman's Fund before the West Virginia Supreme Court of Appeals, arising from the same lower court decision, will review the determination that Fireman's Fund has primary coverage applicable to the motor vehicle accident in question. Fireman's Fund believes that the consideration of the appeal by the West Virginia Supreme Court of Appeals will necessarily involve similar issues of insurance coverage between the parties. If Fireman's Fund succeeds in that appeal, there would be no replacement coverage and petitioner's coverage would necessarily continue in full force and effect. Because the action of the West Virginia highest court could render this case moot, the petition for a writ of certiorari should be denied. At a minimum, this Court should defer its consideration of the petition for a writ of certiorari pending the West Virginia Court's disposition of the Petition for Appeal of Fireman's Fund.

CONCLUSION

Because the issues presented here are still under collateral consideration by the West Virginia Supreme Court of Appeals, Fireman's Fund respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

*JOHN E. HALL
*LOUIS C. LONG
SCOTT T. REDMAN

MEYER, DARRAGH, BUCKLER,
BEBENEK & ECK
2000 The Frick Building
Pittsburgh, Pennsylvania 15219
(412) 261-6600

Attorneys for Respondent
Fireman's Fund Insurance Company

**Counsel of Record*